Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK, ATTORNEY GENERAL .... PETITIONER

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL ..... RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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Petition for Certiorari Filed September 3, 1974
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

MAY IT PLEASE THE COURT:

OPINIONS BELOW

The Opinion of the United States Court of Appeals For the Sixth Circuit is reported at 497 F.2d. 1172 (1974) and appears in the Appendix, pp. 157. The Opinion of the United States District Court For the Western District of Kentucky is reported at 362 F.Supp. 360 (1973) and appears in the Appendix, pp. 129.

JURISDICTION

The judgment of the United States Court of Appeals For the Sixth Circuit was entered on June 5, 1974, and appears in the Appendix, pp. 157. The Petition For Writ of Certiorari was filed less than ninety days from the date aforesaid and docketed on September 3, 1974. The Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit was issued on March 17, 1975, and appears in the Appendix, p. 174. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The jurisdiction of the District Court was invoked because the question arose under the Clean Air Act, as amended, 42 U.S.C. §1857, et seq., a Federal statute relating to the environment. The questions with respect to this statute presented in this BRIEF FOR PETITIONER are as follows:

QUESTION I

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f., AND A

REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED?

QUESTION II

DOES THE RULING OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, PRESENT A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALTIY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED?

QUESTION III

DID THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERR IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2?

STATUTORY PROVISIONS INVOLVED

This case involves Article VI, Clause 2, of the Constitution of the United States of America; Section 110 of the Clean Air Act Amendments of 1970, 84 Stat. 1680,

42 U.S.C. §1857c-5; Section 118 of the Clean Air Act Amendments of 1970, 84 Stat. 1689, 42 U.S.C. §1857f; and Section 304 of the Clean Air Act Amendments of 1970, 84 Stat. 1706, 42 U.S.C. §1857h-2, which are reprinted below. Also involved are Section 101, Section 107, Section 113, and Section 116 of the Clean Air Act Amendments of 1970; 81 Stat. 485, 84 Stat. 1678, 85 Stat. 464, 84 Stat. 1689; 42 U.S.C. §1857, §1857c-2, §1857c-8, §1857d-1; and Kentucky Administrative Regulation AP-1, Section 5, also promulgated in Chapter 7 of Kentucky's Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards. These are reprinted in pertinent part in Appendix C, page 36a, of the Petition For Writ of Certiorari filed in this Court.

Constitution of the United States, Article VI, Clause 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, in pertinent part:

IMPLEMENTATION PLANS

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a

national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard; and (ii) in the case of a plan implementing a national secondary ambient air quality standard,

it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region wil not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation pian, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and

amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonabe notice and public hearings.

Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.:

CONTROL OF POLLUTION FROM FEDERAL FACILITIES

Sec. 118. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from section 111, and an exemption from section 112 may be granted only in accordance with section 112(c). No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2:

CITIZEN SUITS

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced —

(1) under subsection (a) (1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the

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United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c) (1) (B) or an order issued by the Administrator pursuant to section 113 (a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under

any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

STATEMENT OF THE CASE

This action arises on Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit to review the Order of that Court affirming the Judgment of the United States District Court For the Western District of Kentucky entered against plaintiff-petitioner and in favor of defendants-respondents (Appendix, p. 129 and Appendix, p. 157) on the issue of whether Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. requires that Federal facilities operating or controlling air contaminant sources in the Commonwealth of Kentucky must comply with Section 5 of the Kentucky Air Pollution Control Commission Administrative Regulation AP-1 by applying for and obtaining permits from the Kentucky Air Pollution Control Commission.

Plaintiff in the District Court and appellant in the

Court of Appeals For the Sixth Circuit was the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General.

Defendants in the District Court were William D. Ruckelshaus,[1] Administrator, Environmental Protection Agency, when this action was fied; Jack E. Ravan, Regional Administrator, Environmental Protection Agency, Region IV; the Environmental Protection Agency, (all of which are hereinafter referred to as EPA); General Creighton Abrams, Chief of Staff, United States Army; Robert E. Froehlke, Secretary, Department of the Army; Major General W. R. Desbory, Commanding General, United States Army Armor Center and Fort Knox; Major General John Cushman, Commanding General, 101st Airborne Division, (Airmobile), and Fort Campbell; the Department of the Army, (all of which are hereinafter referred to as Army); Aubrey J. Wagner, Chairman, Board of Directors, Tennessee Valley Authority; Lynn Seeber, General Manager, Tennessee Valley Authority; J. L. McPherson, Superintendent, Shawnee Power Plant, Tennessee Valley Authority; T. E. Cavaniss, Superintendent, Paradise Power Plant, Tennessee Valley Authority; the Tennessee Valley Authority, (all of which are hereinafter referred to as TVA); James R. Schlesinger, Chairman, Board of Directors, Atomic Energy Commission; Robert

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[1] Pursuant to Rule 25(d) (1) of the Federal Rules of Appellate Procedure, Russell E. Train was substituted in the Sixth Circuit as a party defendant-appellee in place of William D. Ruckelshaus who has resigned from his position as Administrator of Environmental Protection Agency.

E. Hollingsworth, General Manager, Atomic Energy Commission; B. W. Stiller, Manager, Paducah Gaseous Diffusion Plant, Atomic Energy Commission; the Atomic Energy Commission, (all of which are hereinafter referred to as AEC); and the Union Carbide Corporation.

This action arises out of (1) the refusal of the TVA, the Army, AEC, and Union Carbide Corporation to apply for and obtain for equipment or installations which they are presently operating in the Commonwealth of Kentucky permits from the Kentucky Air Pollution Control Commission,[2] as required in Chapter 7 of Kentucky Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards, (hereinafter referred to as the "Kentucky Plan" or the "Kentucky Implementation Plan"), and (2) the refusal of EPA to commence appropriate action against TVA, the Army, AEC and Union Carbide Corporation upon their refusal to apply for and obtain permits from the Kentucky Air Pollution Control Commission as required by the Kentucky Plan.

As a result of these refusals, the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, filed suit in the District Court on November 16, 1972, asking the Court for declaratory and injunctive relief (1) requiring TVA, the Army, AEC, and Union Carbide Corporation to apply for and obtain permits from the Kentucky Air Pollution Control Commission, (2) restraining the defendants from refusing to comply with the provisions of Sec-

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[2] Now the Kentucky Department For Natural Resources and Environmental Protection.

tion 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., and (3) requiring EPA to commence appropriate action against TVA, the Army, AEC, and Union Carbide Corporation. (Appendix, p. 1).

The claim against TVA, the Army, AEC, and Union Carbide Corporation was based upon 42 U.S.C. §1857f. which provides that Federal facilities "shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements," and Section 5 of Administrative Regulation AP-1 of the Kentucky Air Pollution Control Commission as promulgated in Chapter 7 of the Kentucky Plan pursuant to Section 107 and Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 c-2 and 42 U.S.C. §1857c-5, respectively, which requires, generally, that before any piece of equipment which might result in the emission of air contaminants into the atmosphere can be constructed, modified, or operated within the Commonwealth of Kentucky, the person or agency involved must apply for and obtain air pollution control permits from the Kentucky Air Pollution Control Commission (Administrative Regulation AP-1, Section 5, is reproduced in Appendix C, page 46a, of the Petition For Writ of Certiorari filed in this Court on September 3, 1974). The claim against EPA was based on 42 U.S.C. §1857c-8. (42 U.S.C. §1857c-8 is reproduced in pertinent part in Appendix C, page 41a, of the Petition For Writ of Certiorari filed in this Court on September 3, 1974).

On July 11, 1973, the District Court entered an Order sustaining (1) a Motion For Summary Judgment filed March 16, 1973, on behalf of all defendants except TVA

and its officials, (Appendix, p. 86), and (2) a Motion For Summary Judgment filed March 5, 1973, on behalf of TVA and its officials, (Appendix, p. 63), and overruling a Motion For Summary Judgment filed March 27, 1973, on behalf of the Commonwealth, plaintiff-petitioner, (Appendix, p. 115). The Order of the District Court also directed defendants, respondents herein, to prepare and tender a Memorandum Opinion reflecting the Court's expressed legal views. (Order of District Court, Appendix p. 127).

On August 13, 1973, the District Court entered a Memorandum and Order and Judgment sustaining the Motions of TVA, EPA, the Army, AEC, and Union Carbide Corporation for Summary Judgment and overruling the Motion of the Commonwealth of Kentucky for Summary Judgment. (Appendix, p. 129).

On September 9, 1973, the Commonwealth of Kentucky filed a Notice of Appeal from the Order of the District Court entered on the 11th day of July, 1973, and the Judgment of said Court entered on the 13th day of August, 1973, wherein the Motions for Summary Judgment on behalf of TVA, EPA, the Army, AEC, and Union Carbide Corporation had been sustained. (Appendix, p. 151.)

On June 5, 1974, the Court of Appeals For the Sixth Circuit entered its Opinion affirming the Judgment of the District Court. (Appendix, p. 157).

On September 4, 1974, the Commonwealth of Kentucky, ex rel Ed W. Hancock, Attorney General, filed its Petition For Writ of Certiorari and on March 17, 1975, this Court issued a Writ of Certiorari to the Court of Appeals For the Sixth Circuit. (Appendix, p. 174).

SUMMARY OF ARGUMENTS

I. Examination of the plain meaning of Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., which requires compliance by Federal facilities with State "requirements respecting control and abatement of air pollution," and consideration of the Congressional purpose and the scheme of the Clean Air Act as a whole clearly indicate that Federal facilities operating or controlling air contaminant sources in the Commonwealth of Kentucky are required to comply with Kentucky's permit requirement and all other requirements of the Kentucky Implementation plan adopted pursuant to Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5. In ruling that Federal facilities are subject only to those requirements of this Plan which are characterized as "substantive" the Court of Appeals For the Sixth Circuit has rewritten the statute to grant the affected facilities an exemption from other requirements contained in the Plan, an exemption which was neither intended by the Congress nor authorized under 42 U.S.C. §1857f. The primary responsibility for the control and prevention of air pollution at its source rests with the States and the Congressional plan was that this responsibility was to be met by the formulation and enforcement of State implementation plans designed to achieve and maintain the National standards of air quality promulgated by the Administrator of the Environmental Protection Agency. Accomplishment of this goal requires, and the Congress intended, that the provisions of these Plans be applicable to all air contaminant sources within a State, including those operated or controlled by the Federal Government.

II. Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2, does not provide, nor was it intended to provide, an alternative means by which the States are to meet their responsibilities under the Act. In addition to being limited to actions for violation of "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" this section was clearly designed to allow public participation in the enforcement of the standards of the Act and not as the primary tool of State enforcement. The approach and philosophy of this section are based in the penal principle of arrest, trial and punishment and are antithetical to the regulatory principles of prevention and control reflected in the requirements included in the State Implementation Plans in accordance with 42 U.S.C. §1857c-5, Section 110 of the Clean Air Act Amendments of 1970.

III. The Supremacy Clause is inapposite in this case for three reasons: (i) Federal facilities have been specifically subjected to State regulation in matters of air pollution control by Congressional waiver contained in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.; (ii) the provisions of Kentucky's Implementation Plan have been Federally approved and published in the Federal Register, in accordance with the Clean Air Act, as amended and are enforceable requirements of Federal law; (iii) application of the Supremacy Clause in this case is contrary to the purposes of the clause since the requirements of Kentucky's Implementation Plan do not in any way frustrate or pose an obstacle to the application of Federal law but rather were adopted in order to accomplish the objectives of the Clean Air Act, as amended.

The Doctrine of Sovereign Immunity is likewise inapplicable in the present case since the individuals against whom relief is sought have uniformly exceeded their authority as officers of the sovereign in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief.

ARGUMENT I

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND THE PERMIT REQUIREMENT CONTAINED IN KENTUCKY'S IMPLEMENTATION PLAN FOR THE ATTAINMENT AND MAINTENANCE OF NATIONAL AND STATE AMBIENT AIR QUALITY STANDARDS WAS A REQUIREMENT RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION WITHIN THE MEANING OF SECTION 118 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857f., AND A REQUIREMENT NECESSARY TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED.

The conclusion of the Court of Appeals For the Sixth Circuit that Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., requires that Federal facilities operating air contaminant sources in the Commonwealth of Kentucky need only comply with the "substantive" requirements of Kentucky's Implementation Plan, (Appendix, p. 157, 165), is contrary to the plain meaning of this section, provides a judicially enacted exemption from air pollution requirements which is completely unsupported by other provisions of the Act, and does violence

to the carefully conceived Congressional plan for achieving the goas of the Clean Air Act, as amended. As written, this section paces an unequivocal, unlimited, and mandatory duty on those persons in charge of the administration of air contaminant sources operated by Federal facilities and instrumentalities to comply with State requirements respecting the control and abatement of air pollution. 42 U.S.C. §1857f. provides in pertinent part:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so . . . ."

In considering what the Congress intended by this enactment, this Court should first look to the plain unambiguous language of the statute. *Caminetti* v. *United States,* 242 U.S. 470, (1917). The language of 42 U.S.C. §1857f.is in no way ambiguous. All the language of this section is susceptible to precise definition in its ordinary usage and nowhere has Congress indicated it intended other than the ordinary meaning of the words used.

There can be no doubt that the mandate of this sec-

tion applies to the respondents herein; each is a "department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting in, or which may result, in the discharge of air pollutants," or is a responsible officer of such agency. The words "shall comply" are not possessed of the smallest measure of ambiguity nor do they vest the merest trace of discretion in those to whom the command applies. Further, the statute clearly sets out the thing with which respondents are to comply; "Federal, *State,* interstate, and local *requirements* respecting control and abatement of air pollution." (Emphasis Added). Notably, there is no language limiting this command other than the necessity that the "requirement" be one "respecting control and abatment of air pollution." The language employed does not warrant or authorize the exceptions and distinctions which the Court below wrote into the law; a "requirement respecting control and abatement of air pollution" is a requirement with which respondents "shall comply." Not only is it directed that the covered agencies "shall comply," but they "shall comply . . . to the same extent that any person is subject to such requirements."

In Kentucky, one of the primary "requirements" of State law respecting control and abatement of air pollution is a permit requirement contained in Kentucky Administrative Regulation AP-1, Section 5, which was included in Chapter 7 of Kentucky's Implementation Plan, and reads, in part:

> "(1) No person shall construct, modify, use, operate, or maintain an air contaminant source or maintain or allow physical conditions to exist on property owned by or subject to the control of such person, resulting in the presence of air contaminants in the atmosphere, unless a permit therefor has been issued by the Commission and is currently in effect."

Through the use of the permit system, Kentucky is able to spell out the emission limitations, operating time requirements, emergency episode requirements, testing, monitoring, and record-keeping requirements under which each air contaminant source is to operate. In this regard, it is important to note that while the applicable emission standards are designed to meet the national ambient air quality standards, compliance with emission standards in the absence of controls on operating time, monitoring and inspection, and emergency episodes, will not be effective in achieving the goals. Consideration must be given to the total pollutant load in any area in order to set reasonable and effective emission standards. As well as providing the necessary inventory of pollution potential the permit system enables Kentucky to insure that proper air pollution control equipment is installed, it is the mechanism through which the Commonwealth is able to compel the production of data concerning air contaminant sources. including the ability to prescribe the monitoring techniques to be employed, and it is the only mechanism which allows the Commonwealth to develop and review a source's compliance schedule and insure that schedule is followed. The permit system constitutes the preventive arm of Kentucky's air pollution control program and is an effective tool for reducing air pollution from stationary sources as demonstrated by the Affidavit of Harold G. Peters filed in the District Court herein. [Pl. Ex. 1; Appendix, p. 117].

The significance of the permit system has also been recognized by the Federal government. In the Federal regulations initially proposed by the Environmental Protection Agency, the use of a permit system was a mandatory part of all implementation plans. 36 Fed. Reg. 158 (August 14, 1971). Though this mandatory permit requirement was deleted, the final rule adopted by the Environmental Protection Agency requires each state to have the authority to "obtain information necessary to determine whether air pollution sources are in compliance with all applicabe laws, regulations and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources." 40 C.F.R. §51.11(a) (5). In Kentucky, these functions are implemented by use of the permit system. If deprived of the use of this system, the Commonwealth would be saddled with the impossible burden of attempting to monitor the facilities of the respondents solely through periodic inspections. Moreover, since these monitoring, inspection, and recordkeeping functions are not emission standards, they would presumably be "procedural" requirements under the rulings of the Courts below. As such, they would be unenforceable by the State and the Commonwealth would have to rely on the polluters to turn themselves in. This, despite the requirement of the Environmental Protection Agency that such authority be included in each State's Implementation Plan.

In dealing with an almost identical provision of Alabama law, the Court of Appeals For the Fifth Circuit found:

> "[i]t is not only a part of the implementation plan but appears to be the central mechanism by which the Alabama plan provides for the gathering of information and the enforcement of emission limitations necessary to achieve air quality standards." *State of Alabama* v. *Seeber*, 502 F.2d. 1238, 1243 (1974).[3]

In so ruling that Court determined that the permit requirement was definitely a "requirement respecting control and abatement of air pollution" and, therefore, was a requirement which must be met. This is correct. The only standard and requirement set forth in 42 U.S.C. §1857f. is that the particular requirement be a "requirement respecting control and abatement of air pollution."

Petitioner submits that Kentucky's permit requirement is, similarly, a "requirement respecting control and abatement of air pollution." Certainly, it is a requirement of State law with which all persons operating private air contaminant sources in this Commonweath have had to comply. The plain meaning of 42 U.S.C. §1857f. requires such compliance by Federal facilities. Nowhere does this section make a distinction between "substantive" and "procedural" requirements as has been urged by respondents and accepted by the Courts below. In language of clear and uncompromising generality, with no provision for exception, other than by affirmative action of the President of the United States, the Congress has declared all Federal

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3. The Opinion of the United States Court of Appeals For the Fifth Circuit rendered October 14, 1974, **State of Alabama v. Seeber**, 502 F. 2d 1238, (1974), is reproduced in its entirety in Appendix D, pages 1d-27d, of the Supplemental Memorandum to the Petition for Writ of Certiorari filed in this Court.

facilities and instrumentalities subject to state air pollution control requirements.

The Courts below and the respondents herein, would, presumably, have preferred §1857f. set out a list of certain requirements with which the facilities would be required to comply. Because each possible requirement is not listed specifically in the command to comply, respondents contend, and the Courts below have ruled, that certain requirements are not covered in a command covering State requirements generally. However, the requirements which are to be met *are* stated in §1857f.; they are "requirements respecting control and abatement of air pollution," without limitation. Further, the Congress gave a clear indication of the scope of such requirements in Section 116 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857d-1. Examination of this section clearly demonstrates that "requirements respecting control and abatement of air pollution" involve more than simply emission limitations as respondents contend. In *State of Alabama* v. *Sceber, supra,* at 1245, 1246, the Fifth Circuit Court of Appeals considered the argument advanced with respect to the scope of the applicable requirements and the substantive-procedural dichotomy and stated:

> "Defendants seek to avoid the impact of §118 by engrafting upon it a substantive-procedural overlay. They argue that the phrase 'requirements respecting control and abatement of air pollution' means only requirements such as emission standards and limitations, which they label 'substantive,' and does not include mechanisms, *e.g.*, permit systems, for enforcing these requirements.[6] Having affixed these new labels,

> defendants would have us infer that while federal agencies must, and will, comply with the 'substantive,' it was not intended that they be bound by the 'procedural,' a term which in defendants' construct is subsilentio pejorative, impliedly denigrating the Congressionally-mandated mechanisms of enforcement to a status of less dignity anl import. This recharacterization of the statutory scheme is a semantical red herring. It draws no sustenance from the Act itself. No such limitation is apparent from the words of §118. Moreover the language of §116 [42 U.S.C. §1857d-1] is inconsistent with defendants' reading of 'requirements.' There Congress used words identical to the §118 'requirements' phrase.
>
> > Except as otherwise provided . . . nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution. . . .
>
> The 'or' in §116 is clearly disjunctive. Therefore, contrary to the position of the defendants, 'requirements' must include more than emission standards or limitations.

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[6] This approach necessarily leads them to de-emphasize the remainder of the phrase, which reads 'to the same extent that any person is subject to such requirements.' "

In accepting and approving the substantive-procedur-

al distinction, the Courts below have effectively rendered meaningless the provisions of §1857d-1. This is clearly contrary to the rule of statutory construction requiring that effect should be given to every part of a statute. As the Court stated in *Washington Market Co.* v. *Hoffman,* 101 U.S. 112, 115, 116, 25 L. Ed. 782 (1879):

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, Section 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

The proper interpretation of 42 U.S.C. §1857d-1, giving effect to both clauses, does much to elucidate the scope and coverage of a "requirement respecting control and abatement of air pollution" within the meaning of §1857f. As shown by the Fifth Circuit's consideration of this provision in *State of Alabama* v. *Seeber, supra,* the only way to rationally harmonize these sections is to conclude the phrase includes those requirements which the Court below characterized as "procedural" as well as the "substantive" provisions.

The meaning of 42 U.S.C. §1857f. is, therefore, clear and unambiguous both as to the nature and the scope of the

command it contains. The only other rationale beyond ambiguity, which would necessitate an examination of the legislative history would be if (1) the results of the plain, uncompromising language would be absurd or (2) the purpose of the statute would be thwarted. *United States* v. *Katz,* 271 U.S. 354 (1926); *Helvring* v. *Hammel,* 311 U.S. 504 (1941). The result of the application of the plain meaning of §1857f. would be neither absurd nor would it thwart the purpose of the statute; on the contrary, it is entirely consistent with the scheme of control envisioned by the statute.

The goals of the Clean Air Act as a whole are embodied in Section 101(b) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857(b):

> "(b) The purposes of this title are —
>
> '(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;'
>
> '(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;'
>
> '(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs;' and
>
> '(4) to encourage and assist the development and operation of regional air pollution control programs.' "

Clearly, then, one of the primary goals of the Act was to develop a "program" designed to achieve the "prevention and control of air pollution." That the air pollution prevention and control programs envisioned by the Act were to be State programs is clearly illustrated by the findings of the Congress embodied in Section 101 (a) of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 (a):

> "(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and
>
> (4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local program to prevent and control air pollution."

These sections demonstrate the States are to have primary responsibility in the area of air pollution and that the Federal government is to provide financial assistance and leadership in developing the State plans. In enacting the Clean Air Act, as amended, the Congress of the United States set out and prescribed a carfully conceived plan through which the control and prevention of air pollution was to be accomplished; a plan whose core concept was the development of State control and prevention programs utilizing *State* plans designed to implement minimum National standards of air quality. The specific mechanisms to be employed in this Congressional plan set out with particularity in other sections of the Act. In Section 107, of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-2, the Congress reaffirms the State's responsibility and directs that each shall prepare a plan for meeting these responsibilities:

> "Sec. 107. (a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."

The requirements for these "implementation plans" were set out in Section 110, of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5. The basic requirement contained in Subsection 1857c-5 (a) (1), was that the plan "provide for implementation, maintenance, and enforcement" of both the primary and secondary standards of ambient air quality promulgated by the Administrator pursuant to Section 109 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-4. Specific requirements for these plans are contained in Subsection 1857c-5 (a) (2). With respect to these requirements this Court stated in *Train* v. *National Resources Defense Council,* 43 U.S. L.W. 4467, 4469 (U.S., April 16, 1975):

> "In providing for such attainment, a State's plan must include 'emission limitations, schedules, and timetables for compliance with such limitations'; it must also contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards."

Among these "other measures" necessary to assure attainment and maintenance of the standards, it was required that the Plan:

"(C) . . . includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator.

* * *

(F) . . . provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators or stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this Act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority." 42 U.S.C. §1857c-5 (a) (2).

Clearly, these are requirements designed to give assurance that implementation plans adopted by the States are adequate *to enforce* the standards and *to implement* the necessary controls on air contaminant sources to accomplish the goals and purposes of the Act. The concern of Congress that such plans contain adequate assurance of enforcement capability shows they understood that the mere existence of standards is utterly meaningless without a means of administering and enforcing these standards; their concern

was that the States actually be able *to implement* the standards and achieve the goals of the Act. This is the Congressional "plan;" the "plan" for achieving the goals of the Act and to provide for the enhancement of the quality of this Nation's air.

Application of the plain meaning of 42 U.S.C. §1857f. is entirely consistent with the development and implementation of State plans for the control and prevention of air pollution at its source. This is not true of the interpretation offered by the Courts below. In making the distinction between those elements of Kentucky's Implementation Plan which were characterized as substantive and procedural, these Courts not only denied the State control over all pollution sources but have also ruled contrary to the principle of statutory construction which dictates that where a particular provision appears in a statute, the failure to include that same provision in another section will not be deemed inadvertent. 2 J. Sutherland, *Statutory Construction,* Sec. 4915 (3 Ed. 1943).

In areas where the Congress desired to exempt Federal facilities from compliance with a State requirement or where it wished to preclude State regulation totally, it consistently did so by the use of specific exclusionary language. For example, 42 U.S.C. §1857c-6 (c) (1) allows the Environmental Protection Agency Administrator to delegate to the States the power to enforce performance standards for new stationary sources "except with respect to new sources owned or operated by the United States." 42 U.S.C. §1857c-7 (d) (1) contains authority for the Administrator to delegate his authority to implement and enforce emission standards for hazardous air pollutants "ex-

cept with respect to stationary sources owned or operated by the United States." Such specific exclusion from State regulation is also found in 42 U.S.C. §1857c-9 (b) (1), wherein the Administrator has authority to delegate his authority respecting inspections, monitoring, and entry "except with respect to new sources owned or operated by the United States." The States are similarly precluded by specific statutory language in 42 U.S.C. §1857f-6a from adopting or attempting to enforce any standard relating to the control of emissions from new motor vehicles not adopted prior to March 30, 1966. Had Congress intended to exempt existing stationary sources operated by the Federal government from all State requirements except "applicable standards of air quality and emissions," it could easily have done so by the use of similar exclusionary language. No such language appears in 42 U.S.C. §1857f., but rather the Courts below have rewritten the statute to create such an exemption. This is not the proper function of the judiciary.

As was stated in 62 *Cases, More or Less, Each Containing Six Jars of Jam* v. *United States,* 340 U.S. 593, 596 (1951):

> "[o]ur problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain — neither to add nor subtract, neither to delete nor distort."

Moreover, the applicable exemptive process is clearly set out in 42 U.S.C. §1857f. The Federal government can obtain exemptions from any requirement of a State Implementation Plan when the President of the United States determines such an exemption to be in the paramount interest of the Nation. This is the only exemptive process provided for or authorized by 42 U.S.C. §1857f.; if any other exemption had been intended for existing Federal sources, the Congress would have added such exclusionary language as was uniformly done in all sections dealing with new Federal sources.

After ruling that the Alabama permit requirement was applicable to Federal facilities, the Fifth Circuit, in *State of Alabama* v. *Seeber, supra,* commented on the consistency of this position with the Act as a whole:

> "The general scheme that emerges from the Act as a whole appears to be that responsibility and authority for enforcement with respect to federal facilities is granted to the states for sources with respect to which state implementation plans establish the criteria for enforcement, and is granted to EPA in those instances (*i.e.*, new sources and hazardous pollutants) where EPA establishes the criteria. The scheme is a reasonable one. Because of variations in air quality between states and regions the emissions criteria established under state plans may vary considerably, thus making enforcement by EPA against scattered federal facilities administratively difficult. The new sources and hazardous pollutant criteria established by EPA, however, are not tied to air quality standards and may, therefore, vary little or not at all by area, making EPA enforcement against federal facilities more convenient." *State of Alabama* v. *Seeber, supra,* at 1244.

However, the Sixth Circuit Court of Appeals did not choose to enter into any such analysis of the consistency of its ruling with the Act as a whole, but rather supports it Opinion with a reading of the legislative history which the

Fifth Circuit termed "strained" (*State of Alabama, supra,* at 1246) and the petitioner herein regards as incomplete. Notable in its absence from the Sixth Circuit's discussion of legislative history is any consideration of the provisions of prior law. Petitioner submits that in seeking the purpose of a statutory enactment, particularly where the enactment is an amendment of existing law, it is important to consider the provision which was changed.

Prior to the enactment of Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., the Congress had required a program of voluntary cooperation in the area of air pollution by Federal agencies, embodied in Section 111 of *The Air Quality Act of* 1967, P.L. 90-148:

> "COOPERATION BY FEDERAL AGENCIES TO CONTROL AIR POLLUTION FROM FEDERAL FACILITIES
>
> Sec. 111 (a) It is hereby declared to be the intent of Congress that any Federal department or agency having jurisdiction over any building, installation, or other property shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare and with any air pollution control agency in preventing and controlling the polution of the air in any area insofar as the discharge of any matter from or by such building, installation, or other property may cause or contribute to pollution of the air in such area."

What is immediately apparent from this provision is that

in enacting §1857f., the Congress intended a radical change from the provisions of previous law; an examination of these two provisions clearly indicates that Congress wished to depart from an ineffective program of voluntary cooperation and move instead to a program of mandatory compliance. If, in making such a change, the Congress had desired to make only compliance with "emission standards or limitations" mandatory, it need only have so stated. Obviously, this was not the Statement made in Section 118, and, moreover, this was not the Statement made in either the Senate or the House version.

The Senate version of this section would have directed each Federal agency to "comply with the requirements of this Act in the same manner as any other person would so comply. . . ." [4] The meaning of this phrase does not become clear until the complete statutory scheme is examined to determine the manner of compliance by other persons and the requirements which they must meet. Similarly, The House version would have required compliance with "applicable Federal, State, interstate, and local emission standards and with the purposes of this Act. . . ." [5] As shown earlier, one of the primary purposes of the Act is to provide assistance to the States and local governments in the development and execution of their air control programs, (42 U.S.C. §1857(a)), a program which, in Kentucky, includes a permit requirement. In neither instance is there a simple statement that these facilities need only comply with "emission standards and limitations." Both

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4. S. 4358, 91st. Congress, 2d. Session, Sec. 118 (1970).

5. H.R. 17255, 91st. Congress, 2d. Session, Sec. 111 (1970).

versions raise questions concerning additional requirements relative to "the purpose of this Act," and the manner of compliance by "any other person." However, the District Court and the Sixth Circuit Court of Appeals herein each conclude based on this authority that "requirements respecting control and abatement of air pollution" are nothing more than "emission standards or limitations." (Appendix, p. 129 and Appendix, p. 157). This conclusion is clearly not warranted; as this Court stated in *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260, 89 L.Ed. 921, 933 (1945):

> "The plain words and meaning of a statute cannot be overcome by legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."

See also: *Ex Parte Collett,* 337 U.S. 55, 69, S.Ct. 944, 93 L.Ed. 1207 (1949).

The only thing that is clear from an examination of the legislative history of 42 U.S.C. §1857f. is, therefore, a Congressional desire to make compliance mandatory. As discussed in *State of Alabama* v *Seeber, supra,* at 1245:

> "In strengthening the Act by replacing that section with present §118 Congress sought to depart from the policy of voluntary compliance and make emission limitations enforceable against federal facilities. With respect to existing sources the Act places upon the states primary responsibility for establishing and enforcing emission limitations, and Alabama, like many other states, relies on a permit system as its method

of enforcement as well as a method of generating information concerning emissions. To deny the applicability to federal facilities of that permit requirement would be tantamount to a return to the Congressionally-rejected policy of voluntary compliance by federal facilities.[5] Moreover a holding that §118 does not embrace permit systems would represent a retreat from the provisions of prior §111. That section allowed the Secretary of HEW to establish classes of pollution sources for which federal facilities could be required to obtain a permit from the Secretary. Since §118 does not distinguish between federal and state requirements, holding state permit systems outside the scope of §118 would imply the same conclusion with respect to any federal permit system. The result would be that the Administrator of EPA (who assumed responsibility for air pollution control activities when EPA was established) could not under the stronger §118 do what the Secretary of HEW was explicitly entitled to do under the prior §111.

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[5]. Defendants argue that the state could seek to enforce its emission limitations by resort to court actions under the 'citizens suits' provision, §304 [42 U.S.C. §1857h-2] of the Act. Irrespective of the merits of this suggestion, we believe that §304 provides little guidance to determining the Congressional purpose in enacting §118. . . ."

The Fifth Circuit later concludes "with regard to this question of legislative history, except to the extent that it reveals the Congressional purpose discussed earlier, is ambiguous. Confronted with this ambiguity, we rely on

the words of §118, the scheme of the Act as a whole, and what we discern to be the Congressional purpose, as the best guides to interpreting the section." (*State of Alabama* v. *Seeber, supra,* at 1247).

It has been, and is, petitpioner's contention that an examination of the legislative purpose of the Clean Air Act Amendments of 1970, a tracing of the "scheme" for achieving those purposes through the Act as a whole, and the plain, unambiguous language of §42 U.S.C. §1857f., lead unalterably to the conclusion that the requirements of a State's Implementation Plan, adopted pursuant to Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, are "requirements respecting control and abatement of air pollution" within the meaning of §1857f. As such, they are requirements with which Federal facilities "shall comply" under the mandate of 42 U.S.C. §1857f. The question in this case is not whether a particular State requirement may be classified as procedural or substantive, but rather whether that requirement is a "requirement respecting control and abatemnt of air pollution." Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., does not make any distinction as to "procedural" or "substantive" requirements, either is useless without the other, but rather directs that Federal agencies and instrumentalities "shall comply with . . . State . . . requirements respecting control and abatement of air pollution" The permit requirements embodied in Section 5 of the Kentucky Administrative Regulation AP-1 and in Chapter 7 of the Kentucky Implementation Plan, is clearly such a requirement in Kentucky. The decisions of the Courts below which granted all Federal facilities blanket judicial exemption from the requirements of Kentucky's Impementation Plan do violence to the carefully conceived regulatory scheme of Congress, a scheme in which the States were given primary enforcement responsibility.

There can be no implementation of the standards of air quality if these standards stand alone without a mechanism of enforcement to assure they are met by all sources. It is just such a mechanism which was provided for in 42 U.S.C. §1857c-5. The provisions of the implementation plans adopted and approved in accordance with this section are absolutely necessary to the achievement of the goals of the Clean Air Act, as amended, and these are the "requirements respecting the control and abatement of air pollution" which the Congress made applicable to Federal facilities and instrumentalities in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f.

ARGUMENT II

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FINDING THAT AIR CONTAMINANT SOURCES OWNED, OPERATED, OR CONTROLLED BY THE FEDERAL GOVERNMENT ARE SUBJECT ONLY TO ACTIONS UNDER SECTION 304 OF THE CLEAN AIR ACT AMENDMENTS OF 1970, 42 U.S.C. §1857h-2, AND THIS RULING PRESENTS A SIGNIFICANT HINDRANCE TO THE EFFECTIVE IMPLEMENTATION OF THE STANDARDS OF AIR QUALITY AND THE ACCOMPLISHMENT OF THE GOALS OF THE CLEAN AIR ACT, AS AMENDED.

The Court of Appeals For the Sixth Circuit erred in its construction of the Clean Air Act, as amended. particularly with respect to Section 118 and Section

304 of the Clean Air Act Amendments of 1970, 42 U.S. C. §1857f. and §1857h-2 and the interrelation of those sections. The error in the reasoning of the Court below is reflected in its conclusion that:

> "Congress intended that federal facilities comply with the emission standards and limitations of the state plan where they are located. Such compliance is mandated by Section 118 and made enforceable by legal action pursuant to Section 304. By defining the term 'emission standard or limitation' broadly in Section 304(f) Congress provided a means of enforcing all of the substantive provisions of a state plan, for prevention as well as after-the-fact violation." [Appendix, 157, 168].

In this statement, the Court below has ignored the fact that 42 U.S.C. §1857f. does not mandate compliance with the "substantive provisions of a state plan," but rather requires compliance with State "requirements respecting control and abatement of air pollution." Further, it is unnecessarily strained and circuitous to say compliance with "substantive provisions of a state plan" is "mandated by Section 118 and made enforceable by legal action pursuant to Section 304" since 42 U.S.C. §1857h-2 itself quite clearly "mandates" compliance with such requirements and provides for such legal action completely independent of 42 U.S.C. §1857f. This section, 42 U.S.C. §1857h-2, provides, in pertinent part:

> "Sec. 304. (a) Except as provided in subsection

> (b), any persons may commence a civil action on his own behalf—
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.
>
> * * *
>
> (f) For purposes of this section, the term 'emission standard or limitation under this Act' means—
>
> (1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive.

which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan."

It is clear from these provisions that suits brought under §1857h-2 are strictly limited to violations of compliance schedules, emission standards, and standards of performance and may be maintained independently of §1857f. Further, no mention is made of any other requirements which may be contained in implementation plans. It is a well established rule of this Court, followed numerous times, that every provision of a statute is to be construed, if possible, so as to give it operative meaning and a corollary that no section of a statute should be given a construction which will render it redundant or meaningless where another interpretation will give it effect.[6] In making the determination that the State may enforce only those parts of its implementation plan deemed "substantive provisions, "the Courts below have rendered 42 U.S.C. §1857f. a mere restatment of 42 U.S.C. §1857h-2 in contravention of this principle of construction.

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6. **Washington Market Co. v. Hoffman**, 101 U.S. 112, 25 L.Ed. 782 (1879); **Jarecki v. G. D. Searle & Co.**, 81 S.Ct. 1579, 367 U.S. 303, 6 L.Ed. 2d. 859 (1961); **Weinberger v. Hynson, Westcott & Denning, Inc.**, 93 S.Ct. 2469 (1973).

As the title, "Citizen Suits," implies, the primary purpose of §1857h-2 is to authorize the participation by private citizens, acting on their own behalf, in the enforcement of the standards set forth in the Act and the implementation plans. The legislative history of this provision clearly demonstrates that the intent was to extend enforcement capability to private individuals, not to limit or define the extent of the State's ability to enforce their implementation plans. This may be demonstrated by the comments of the drafters of this provision:

Senator Cooper, *Congressional Record,* Volume 116, Part 24, p. 33117:

"The committee bill also breaks new ground in extending public participation, an essential element throughout the act, to enforcement proceedings. In section 304, the bill proposes to grant jurisdiction to the Federal district courts to hear charges of violation of particular provisions of the act brought by citizens acting in their own behalf."

Senator Muskie, *Congressional Record,* Volume 116, Part 24, p. 33103:

"What we are talking about here is a judicial way for citizens to enforce the provisions of this act. May I make another point about it, that before any citizen can bring an action, he is required to notify the enforcement agency concerned of his intent to do so, and the specific alleged violation which he has in mind. In other words, the idea is

to use citizens to trigger the enforcement mechanism. If that enforcement mechanism does not respond, then the citizen has the right to go to court."

Senator Spong, *Congressional Record,* Volume 116, Part 24, p. 32919:

"It is not our intent to substitute citizens suits for the enforcement efforts of the responsible administrative agencies. Rather, we intend the provision to complement and encourage the abatement activities of governmental agencies."

Senator Muskie, *Congressional Record,* Volume 116, Part 24, p. 32927:

"First of all, a citizen suit can be brought only to enforce the provisions of the act or the requirements that are established as a result of the operations of the act. In other words, a citizen suit is limited to the right to seek the enforcement of the provisions of the act.

Second, before bring [sic] suit, there is a requirement in this provision that the citizen bring his intention to bring suit to the attention of the local enforcement agency, the thought being that he might trigger administrative action to get the relief that he might otherwise seek in the courts."

Particularly noteworthy in these comments is the relation seen between primary administrative action and citizens suits. It is apparent that these Senators

did not equate such administrative action with judicial relief under 42 U.S.C. §1857h-2. Rather, it was anticipated that where a problem was brought to the attention of the responsible administrative agency, the necessity of court action under §1857h-2 would often be eliminated by the application of administrative remedies under that agency's primary enforcement powers.

This underscores the basic error which has been made by the Courts below in their failure to recognize that the Clean Air Act, as amended, is primarily a regulatory statute. The Act is geared to the regulation, control, and prevention of air pollution at its source; it provides for administrative action, the gathering and assessing of data, the development, dissemination, and use of new technology, and it directs the formulation and employment of implementation plans designed to acheive and maintain the National standards of air quality. However, notwithstanding the requirements of the Act that the States are to formulate and adopt comprehensive *implementation plans* and despite the provisions of the Act specifying the powers and authorities which these plans are required to contain to assure that the plans can be effectively carried out, the Courts below conclude that the standards are to be *"implemented"* by the use of legal action under the Citizen Suit provision of the Act, 42 U.S.C. 1857h-2.

This manner of implementation is not based on regulation. prevention, and control as was intended by the Congress but rather relies on an entirely different principle reflecting a different philosophy and

approach; the penal principle of arrest, trial, and punishment.

Actions under 42 U.S.C. §1857h-2 are strictly limited to cases of a violation of a compliance schedule, emission standard, or a standard of performance. While an action to enjoin further violation may be perfectly appropriate, it bears little or no relation to the concepts of control and prevention, the functions which the State is charged with carrying out. Moreover, the necessity of an abatement proceeding would be ample evidence that the State's program of prevention and control was ineffective. The rulings of the Courts below and the position maintained by the respondents herein effectively reduce this Commonwealth to the role of policeman, catching violators and bringing them to justice in the courts. This is not reflective of the Congressional plan for the implementation of the standards of the Act.

Accomplishment of the goals of the Act requires planning and control over all sources of air pollution, for it is a fact of life in the United States today that few of the major sources of air pollution, including facilities operated by the Federal Government as well as private enterprise, are currently in compliance with all minimum standards necessary to protect human health. In the face of this problem, the rulings of the Courts below place the implementation of these standards under a system much better suited to dealing with instances of deviation from an accepted norm. What

is needed in the area of air pollution control, and what was provided by the Congress in the Clean Air Act, as amended, is a system which is capable of raising the National norm to a new and higher standard.

In enacting 42 U.S.C. 1857f. it was the intent of Congress to grant the States a right commensurate with their responsibilities; the right to prevent and control air pollution at its source and to that end to exercise the requisite control over all sources within their boundaries. 42 U.S.C. 1857h-2 does not provide this requisite control and does not provide an alternative through which the States can meet their responsibilites under the Act, nor was it intended to. As stated by the Court of Appeals for the Fifth Circuit in *State of Alabama* v. *Seeber,* 502 F.2d. 1238, 1248 (1974):

> "The 'Citizens Suits' heading of §304, the fact that §304(d) provides for awarding attorney fees, and the legislative history of the section demonstrate that the congressional focus in enacting that provision was on suits by private parties. Consequently, we believe that §304 cannot be properly read as implying anything about the ability of states to sue under §118."

The ability to bring suit for a violation of a compliance schedule is no substitute for the ability to participate in the formulation of that schedule or for a prior review of the control strategies and equipment to be employed. The rulings of the Courts below have

effectively precluded the efficient employment of this Commonwealth's implementation plan, a plan which Congress intended to be the primary mechanism through which the National primary and secondary standards of ambient air quality were to be achieved and maintained in this State. In meeting the State's responsibilities under the Act, Kentucky must rely, not on the plan required in the Act, but on the good intentions of the polluters and the hope that they will provide the State with enough information to support an abatement action in cases of non-compliance. This is clearly contrary to the intent of Congress and does not provide for the prevention and control of air pollution and the planned implementation of the air quality standards which the Clean Air Act, as amended, was designed to achieve.

ARGUMENT III

THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN RULING THAT THIS ACTION WAS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY AND BY THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2.

A. SUPREMACY CLAUSE

The reliance of the Court of Appeals For the Sixth Circuit on the Supremacy Clause of the United States Constitution in this action is misplaced and in error. (Appendix 157, 164, 165) There are at least three reasons why the Supremacy Clause is inapposite

herein. First, Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., expresses a clear Congressional waiver and specifically subjects Federal facilities to State regulation. Second, the provisions of Kentucky's Implementation Plan have been Federally approved and published in the Federal Register[7] and are enforceable requirements of Federal law. Third, application of the Supremacy Clause in this action is contrary to the policy supporting the rule since the provisions of Kentucky's Implementation Plan do not frustrate Federal law, the evil against which the Supremacy Clause protects.

The power of Congress to waive the immunity of the Federal government under the Supremacy Clause is clear. As was stated in *Mayo* v. *United States,* 319 U.S. 441, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1943):

> "It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."

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7. Kentucky's Implementation Plan was originally approved on May 31, 1972. 37 Federal Register 10842. This approval was vacated in the case of **Buckeye Power Co., et al v. EPA,** 481 F.2d. 162 (6 CA, June 28, 1973). The Kentucky Plan was resubmitted and published by the Administrator of Environmental Protection Agency as proposed rule making on March 19, 1974. 39 Federal Register 10277. On August 15, 1974, the Administrator of Environmental Protection Agency published his approval of the re-submitted Kentucky Plan with one exception not relevant to the issues herein. 39 Federal Register 29357.

In this case, the Congress has enacted such a waiver. In enacting 42 U.S.C. §1857f. the Congress has declared clearly, explicitly, and most affirmatively, that Federal facilities "shall comply" with State air pollution requirements:

> "Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. §1857f.

It is difficult to imagine how Congress could have made a more affirmative declaration that the facilities of the Federal government were subject to State regulation than was made in this section. The uncompromising and unlimited language employed leaves no room for discretion; if the requirement is a "requirement respecting control and abatement of air pollution," it is a requrement to which Federal facilities are subject. As discussed more fully in Argument I of this Brief, the permit requirement contained in Kentucky's Implementation Plan is definitely a requirement respecting control and abatement of air pollution.

In the case of *State of Alabama* v. *Seeber*, 502 F.

2d. 1238, 1243 (1974), the Court of Appeals for the Fifth Circuit construed this language and concluded:

> "The phrase 'shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements' effectively conveys a Congressional intent that federal facilities are to be treated equally with private facilities in the scheme of control established by the Act. Recognizing that in particular instances such treatment might prove inconsistent with the national interest, the section provides for executive exemption from any requirement."

Having so concluded, the Court of Appeals For the Fifth Circuit ruled:

> "It is on the proper interpretation of §118 that we part company with the Sixth Circuit. For the reasons explicated in Part I, *supra*, we believe that §118 does embrace the Alabama permit requirement. Having reached this conclusion, the Supremacy Clause is applicable because Congress has authorized subjecting federal facilities to the State regulation involvd. 'It lies within Congressional power to authorize regulation . . . by the state of federal instrumentalities.' *Mayo* v. *United States*. 319 U.S. 411, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1948). Section 118 adequately meets the requirement that Congress 'affirmatively declare its instrumentalities or property subject to [state] regulation. . . .' Id. at 448, 63 S.Ct. at 1141,

87 L.Ed. at 1509." *State of Alabama* v. *Seeber, supra,* at 1247, 1248.

Similarly, the Court of Appeals For the Ninth Circuit recently ruled that a virtually identical provision of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1251 et. seq., contained such a waiver of Federal immunity under the Supremacy Clause. In construing Section 313 of that Act, 33 U.S.C. §1323 in the case of *California* v. *EPA*, 7 ERC 1667, 1671, (9 CA, Feb. 13, 75), the Court of Appeals For the Ninth Circuit ruled:

"Having determined that Congress had the power to

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8. 33 U.S.C. § 1323, reads as follows:
"Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 1316 or 1317 of this title. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation."

compel agencies within its 'exclusive' legislative jurisdiction to seek state discharge permits, we now consider whether it acted in a sufficiently unequivocal manner for us to conclude that it clearly intended to do so. *See, e.g., United States* v. *King*, 395 U.S. 1, 4 (1969). We find the language of waiver sufficiently clear and free from ambiguity."

Having so ruled, the Court goes on to state:

"Section 313 also requires federal agencies to comply with state pollution control requirements 'to the same extent that any person is subject to such requirements.' Hence, the extent of the federal agency compliance duty can only be gauged from the type of program that section 402 of the Act demands that states institute for private dischargers." *California* v. *EPA, supra,* at 1672.

Further, with respect to the nature and scope of the requirements imposed under Section 313 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1323, the Court concluded:

"[I]t would appear that the reference in Section 313 to federal agency compliance with state 'requirements,' was purposeful and artistic, and was meant to refer to those requirements which state administrative agencies might adopt under their express Section 402 authorizations." *California* v. *EPA, supra,* at 1673.

Section 402 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1342, sets forth the requirements which must be incorporated into a State program before the Administrator of the Environmental Protection Agency

may delegate that State the authority to administer the National Pollutant Discharge Elimination System. These requirements relate the State's authority to implement and enforce the standards established under this Act and in this regard serves the same function as does Section 110, 42 U.S.C. §1857c-5, with respect to the Cleam Air Act Amendments of 1970. The rulings of the Ninth Circuit on the relation of Section 313 and Section 402 of the Federal Water Pollution Control Act of 1972, 33 U.S.C. §1323 and 33 U.S.C. §142, are, therefore, directly applicable to the relation of Section 118 and Section 110 of the Clean Air Act Amendments of 1970, 42 U.SC §1857f and 42 U.S.C. §1857c-5, and are supportive of the conclusion that the requirements of Kentucky's Implementation Plan, adopted pursuant to §1857c-5 are applicable to Federal facilities under §1857f.

The ability of Congress to employ broad and uncompromising language in waiving Federal Supremacy and subjecting Federal facilities to State regulation was also established in *Baltimore National Bank* v. *State Tax Commission,* 297 U.S. 209 (196). The issue presented in that case was the power of a state to tax shares in a national bank which were held by an instrumentality of the Federal government. The Court held that the State did have such a power, and based its holding on the fact that Congress had consented to this taxation by statute. The language of this statute indicated that "all" the shares of a national banking association whose principal place of business is within the limits of a State are subject to taxation at the discretion of that State's legislature. From this, the Court reasoned that shares held by an agency of the Federal government were taxable. In the instant case, the language of 42 U.S.C. §1857f. is even more explicit in indicating the consent of Congress to waive any insulation that a Federal facility might possess under the Supremacy Clause; §1857f. expressly provides that the Federal facilities are subject to local "requirements" in air pollution matters. This is a clear and unequivocal waiver of any Federal primacy under the Supremacy Clause.

The Supremacy Clause does not pose a bar to this action for the further reason that the requirements of Kentucky's Implementation Plan are enforceable as Federal, as well as State, law. The Kentucky Plan was adopted in accordance with Section 110 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-5, and was submitted to the Administrator for approval. The Plan was subsequently approved, with minor exceptions, and was published in the Federal Register by the Environmental Protection Agency[9], and became a regulation enforceable by the Administrator under Federal law. The relationship between Federal law and a State implementation plan was discussed in the case of *Getty Oil Company (Eastern Operations)* v. *Ruckelshaus,* 342 F.Supp. 1006 (D. Del. 1972), *modified* 467 F.2d 349 (3rd. Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973). That case dealt with an oil company's obligation under a compliance schedule that was part of a local regulation. The United States District Court in Delaware concluded:

"In the terminology of the statute and regulations,

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9. 39 Federal Register 29357. See footnote (7) on page 49 of this Brief.

> Delaware's Regulation IV is a part of the compliance schedule incorporated in Delaware's Implementation Plan. It has received federal approval and *violation thereof is a federal crime* enforceable by the Administrator. . . ." 342 F.Supp. 1006, 1017. (Emphasis Added).

Refusal to comply with the permit procedures contained in Kentucky's Implementation Plan is, therefore, a violation of Federal, as well as State, law. As was discussed by the Administrator of the Environmental Protection Agency in the Guidelines for Implementation Plans:

> "Upon approval by the Administrator, a State plan is enforceable by the Administrator under the Clean Air Act. All approved provisions relating to attainment and maintenance of national standards, including approved rules and regulations, are subject to such enforcement action. Where a State plan includes regulations designed to attain and maintain air quality better than that required by national standards, such regulations are subject to enforcement action under the Clean Air Act unless they are separate from those necessary for attainment and maintenance of national standards."
>
> 37 Fed. Reg. 10846 (May 31, 1972).

Section 113 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857c-8, reads, in part:

> "Sec. 113. (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of

> an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such findings. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b)."

This section demonstrates that the provisions of State implementation plans are Federally enforceable. Moreover, the requirement that the State be notified and given thirty days to act is indicative of a preference that these Federal requirements be enforced by State action. Therefore, in refusing to comply with the requirements of Kentucky's Implementation Plan, the respondents herein are not simply resisting a regulation adopted *sua sponte* by Kentucky in the provincial exercise of its police power, but they are refusing to comply with a regulation enforceable under Federal law. No reading of the Supremacy Clause can justify the refusal of respondents to comply with these Federal regulations.

Finally, the application of the Supremacy Clause is inappropriate in this case because the regulations which Kentucky seeks to impose do not in any way act to frustrate or thwart the application of Federal law, but rather are in furtherance of and were adopted pursuant to Federal law. In the case of *Perez* v. *Campbell,* 402 U.S. 637 (1971), this Court quoted with approval the standard for determining whether a State statute was in conflict with the Supremacy Clause first enuncicated in *Hines* v *Davidowitz,* 312 U.S. 52 (1941):

> "'In the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Perez* v. *Campbell, supra,* at 649.

See also: *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963); *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S 224 (1964); *Nash* v. *Florida Industrial Comm.,* 389 U.S. 235 (1967).

Applying the *Hines* test to the instant case, there is no question that these requirements do not conflict with Federal law since it is through the application of the State implementation plans that the objectives and goals of the Clean Air Act are to be obtained In fact, it was at the specific direction of Congress that these plans were formulated and adopted. Under these circumstances, the Supremacy Clause is clearly not a bar to this action to secure compliance with the provisions of Kentucky's Plan.

B. SOVEREIGN IMMUNITY

The Court of Appeals For the Sixth Circuit has also ruled that with respect to all non-Tennessee Valley Authority respondents, the Doctrine of Sovereign Immunity is applicable in this case (Appenix, p. 157, 164, 165). However, none of the respondents herein are shielded behind this Doctrine under the specific allegations of the Complaint in this action. (Appendix, p. 1-34). There is a legion of cases which have held that the Doctrine has no application whatsoever in those instances where a Federal officer or employee has violated his duties under a Federal

statute. See: *Dugan* v. *Rank,* 372 U.S. 609 (1963); *Malone* v. *Bowdoin,* 369 U.S. 643 (1962); *Carter* v. *Seamons,* 411 F.2d 767 (5 CA 1969) *cert. den.* 397 U.S. 941 (1970); *State of Washington* v. *Udall,* 417 F.2d 1310 (9 CA 1969). In the leading case of *Larson* v. *Domestic and Foreign Commerce Corporation,* 337 U.S. 682, 689, 93 L. Ed. 1628, 1635, 1636 (1949) this Court stated:

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign . . . [w]here the officer's powers are limtied by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief"

The circumstances described above are precisely the circumstances which are present in this case. As alleged in the Complaint in this action, (Appendix, p 1-34), 42 U.S.C. §1857f. imposes a mandatory duty on those persons responsible for the administration and operation of Federally owned or operated air contaminant sources to comply with the requirements of State law; a duty which they have uniformly failed to perform.

In the case of *Carter* v. *Seamons,* 411 F2d. 767 (5 CA 1969), *cert. den.,* 397 US 941 (1970), the Fifth Circuit Court of Appeals adopted the procedure of "accepting at face value, for jurisdictional purposes, the averments of the complaint unless they are so

transparently unsubstantial or frivolous as to afford no possible basis for jurisdiction, and of giving the averments thus accepted their natural jurisdictional consequences." Applyng that procedure, the Court found, for jurisdictional purposes only, "the case sub judice is not against the United States, but one rather to compel the Secretary of the Air Force to perform a clear legal duty" *Carter* v. *Seamons, supra,* at 771. Accordingly, the Court held the defense of sovereign immunity was unavailable. See also: *Davis, Administrative Law Treatise,* Volume 3, 27.03, in which it is observed:

> "Despite the pervasive inconsistencies, the case law is dominated by one outstanding generalization that is usually followed but sometimes violated — that sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."

In the present case, the individuals against whom relief is sought have uniformly exceeded their authority in refusing to comply with the mandate of a Federal statute and are properly subject to suit for specific relief. Moreover, Congress has consented to such suits against the United States in the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f. See: *County of Milwaukee* v. *Veteran's Administration,* 5 ERC 1412 (ED Wisc., May 7, 1973), in which the Court dismissed the Veteran's Administration's argument that sovereign immunity barred a suit by Milwaukee County to force it to comply with a county ordinance requiring the use of dust separating equipment. The Court correctly held that §1857f. was a Congressonal consent to suits against Federal agencies that fail to comply with State requirements respecting the control and abatement of air pollution. See also: *State of Alabama* v. *Seeber,* 502 F.2d. 1238 (1974).

CONCLUSION

The construction of the Clean Air Act embodied in the decisions rendered by the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit does violence to the carefully conceived plan of the Congress for the implementation of the National primary and secondary standards of air quality and constitutes a significant hindrance to the proper employment and administration of Kentucky's Implementation Plan and the achievement of the goals of the Act. In order to provide that the States have the requisite authority needed to fulfill their responsibilities for the control and prevention of air pollution at its source, the Congress declared in Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f., that Federal facilities and instrumentalities operating or controlling air contaminant sources were to comply with State "requirements respecting control and abatement of air pollution." The body of these requirements in

the Commonwealth of Kentucky are contained in its Implementation Plan, adopted and approved in accordance with the direction and requirements of Section 110 of the Clean Air Act Amendments of 1970. 42 U.S.C. §1857c-5.

The Courts below have, however, written into the law provisions exempting Federal facilities from compliance with this Plan in contravention of the intent of Congress. In ruling that the provisions of this Commonwealth's Implementation Plan are not "requirements respecting control and abatement of air pollution" and that the National primary and secondary standards of ambient air quality are to be implemented through legal action under Section 304 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857h-2, the Courts have thwarted and frustrated the regulatory scheme enacted by the Congress and have exempted many of this Commonwealth's major air contaminant sources from the control and review necessary to implement the standards and end the defilement of the air of the United States.

For these and the foregoing reasons, the Judgments of the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit should be reversed and an Order entered granting Petitioner's Motion for Summary Judgment and requiring Respondents herein to comply with the provisions of Kentucky's Implementation Plan For the Attainment and Maintenance of National and State Ambient Air Quality Standards, as required by the Clean Air Act, as amended.

Respectfully submitted,

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CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein BRIEF FOR PETITIONER Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, was served by mailing three copies hereof, via United States mail, air mail postage prepaid, to: Honorable William B. Saxbe, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Harry R. Sachse, Assistant Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530;Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D. C., 20530; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee, 37830; Honorable Andrew P. Miller, Attorney General, Commonwealth of Virginia,

and Honorable Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; Honorable Evelle Younger, Attorney General, State of California, and Honorable Foster Knight, Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General; Honorable Robert H. O'Brien, Assistant Attorney General, and Honorable Nicholas C. Yost, Deputy Attorney General, State of California, 600 State Building, 217 West First Street, Los Angeles, California, 90012; Honorable John J. Hill, Attorney General, State of Texas, and Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Post Office Box 12548, Austin, Texas, 78711, AND by mailing three copies hereof, via United States mail, postage prepaid, to: Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; Honorable James F. Gordon, Judge, United States District Court, Western District of Kentucky, United States Courthouse, Louisville, Kentucky, 40202; and Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio, 45202, and further the undersigned hereby certifies that all parties re-

quired to be served in this action have been served, all this the 29 day of April, 1975.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF
KENTUCKY

By: David D. Beals

David D. Beals
Assistant Attorney General
Commonwealth of Kentucky